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16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**

18 JACOB MANDEL, et al.,

Case No. 3:17-CV-03511-WHO

19 Plaintiffs,

**PLAINTIFFS' OPPOSITION TO
REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF DEFENDANT DR. RABAB
ABDULHADI'S MOTION TO DISMISS
[ECF NO. 135]**

20 v.
21 BOARD OF TRUSTEES of the CALIFORNIA
22 STATE UNIVERSITY, et al.,

23 Defendants.

Date: July 18, 2018

Time: 2:00 p.m.

Location: Courtroom 2 (17th floor)

Judge: Hon. William H. Orrick

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Complaint Filed: June 19, 2011
Second Am. Complaint Filed: March 29, 2018

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1 **I. INTRODUCTION**

2 In connection to her motion to dismiss the Second Amendment Complaint (“SAC”), Dr.
 3 Abdulhadi filed a request for this court to take judicial notice of five documents (ECF No. 135, the
 4 “RJN” and its Exhibits A-E). But the RJN is not clear whether Dr. Abdulhadi wants the Court to
 5 just take judicial notice that the documents exist, whether she wants the documents incorporated by
 6 reference into the SAC, or whether she hopes that the Court will accept as true certain statements
 7 within those documents. Regardless of which of these options Dr. Abdulhadi actually seeks, her
 8 request for judicial notice should be denied because she does not meet the standard for either judicial
 9 notice of adjudicative facts or incorporation by reference for any of the five documents.

10 **II. LEGAL STANDARD**

11 “Ordinarily, a court may look only at the face of the complaint to decide a motion to
 12 dismiss.” *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002). If a court
 13 looks beyond the pleadings then “[a] court must normally convert a rule 12(b)(6) motion into a Rule
 14 56 motion for summary judgment.” *Gerritsen v. Warner Bros. Entertainment Inc.*, 112 F.Supp.3d
 15 1011, 1019-20 (C.D. Cal. 2015) (citing *United States v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir.
 16 2003)). While there are limited exceptions to this rule—such as the doctrines of judicial notice and
 17 incorporation by reference—this does not change that “[t]he only relevant question in deciding such
 18 a motion is whether plaintiff’s allegations, *taken as true*, plausibly state a claim.” *Gerritsen v.*
 19 *Warner Bros. Entertainment Inc.*, 112 F.Supp.3d 1011, 1022 (C.D. Cal. 2015) (emphasis in
 20 original).

21 **A. Judicial Notice**

22 Federal Rule of Evidence 201 “governs judicial notice of an adjudicative fact.” Fed. R. Evid.
 23 201(a). “Adjudicative facts are simply the facts of the particular case.” Notes of Advisory
 24 Committee on Proposed Rules Subdivision (a). The “kinds of facts that may be judicially noticed”
 25 are those that “are not subject to reasonable dispute” because they “can be accurately and readily
 26 determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid.
 27 201(b)(2); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). A “high degree of
 28 indisputability is the essential prerequisite.” Fed. R. Evid. 201, Advisory Comm. Notes (2011). To

1 that end, “[c]are must be taken that Rule 201 not be used as a substitute for more rigorous
 2 evidentiary requirements and careful factfinding.” *Korematsu v. United States*, 584 F.Supp. 1406,
 3 1415 (N.D. Cal. 1984); *see also* Rule 201 Advisory Comm. Notes (2011) (“[T]he tradition has been
 4 one of caution in requiring that the matter be beyond reasonable controversy.”).

5 **B. Incorporation by Reference**

6 A document not attached to a complaint “may be incorporated by reference into a complaint
 7 if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff’s
 8 claim.” *Ritchie*, 342 F.3d at 908. In deciding a motion to dismiss, courts will only incorporate a
 9 document by reference if the “document is central to a plaintiff’s claim and no party questions its
 10 authenticity.” *Gerritsen*, 112 F.Supp.3d at 1024. In the motion to dismiss context, the incorporation
 11 by reference doctrine is not meant to serve as a vehicle for the defendants to challenge the facts in
 12 the complaint. Instead, the incorporation is designed “to prevent plaintiffs from surviving a Rule
 13 12(b)(6) motion by deliberately omitting documents upon which their claims are based.” *Swartz v.*
 14 *KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (internal quotation marks and citations omitted).

15 **III. DEFENDANT’S REQUEST FOR JUDICIAL NOTICE SHOULD BE DENIED**

16 Dr. Abdulhadi has not met her burden of showing that the Court should take judicial notice
 17 of any purported facts within Exhibits A-E to the RJN, nor has she met her burden of showing that
 18 any of the documents should be incorporated by reference to the SAC.

19 **A. The Facebook Post (Exhibit A to the RJN)**

20 Exhibit A is a Facebook post by Dr. Abdulhadi referred to in one paragraph in the SAC (¶
 21 130) (the “Facebook post”). In that Paragraph, Plaintiffs allege in relevant part:

22 On February 23, 2018, in response to **Wong’s** recent reversal of his previous
 23 position that Zionists were not necessarily welcome on campus, **Defendant**
 24 **Abdulhadi** declared on her personal Facebook page—which she then shared
 25 to the official AMED page—that she “[C]onsider[s] **Wong’s**] statement...to
 26 be a declaration of war against Arabs, Muslims, Palestinians...I am ashamed
 27 to be affiliated with SFSU administration and demand the immediate
 28 retraction of this racist, Islamophobic and colonialist statement...it is
 embarrassing to have our campus leadership cater to...the Israeli lobby.”

SAC ¶ 130. Factual allegations are sufficiently plausible when they “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556

1 U.S. 662, 678 (2009). Plaintiffs included this recent development because it reflects Dr.
 2 Abdulhadi's reactionary animus toward Zionist Jews (including Plaintiffs), and supports the more
 3 than plausibility of the allegations against Dr. Abdulhadi in the SAC. If the *mere welcoming* of
 4 Zionists on SFSU's public university campus prompts this kind of visceral reaction from Dr.
 5 Abdulhadi—a public statement considering that welcoming a "*declaration of war*" that demands an
 6 "immediate retraction"—this certainly supports drawing a reasonable inference that it is *plausible*
 7 that she instructed the shutdown of the Barkat event and the intentional denial of Hillel from hosting
 8 a table at the "Know Your Rights" Fair. Given this reaction in her Facebook post (combined with
 9 the detailed allegations regarding her "anti-normalization" mandate, it would be implausible to
 10 believe Dr. Abdulhadi had *not* done everything in her power to shut down the Barkat event and
 11 exclude Hillel.

12 Dr. Abdulhadi's apparent purpose with the RJD as to Exhibit A is to soften the quote from
 13 the SAC by adding additional text from the Facebook post. According to the RJD, the Court should
 14 be aware

15 that Dr. Abdulhadi's statement indicates that President Wong's statement
 16 welcoming Zionist to campus and equating Jewishness with Zionism is a
 17 declaration of war against "all those who are committed to an indivisible
 18 sense of justice on and off campus. This includes our sisters and brothers
 in the Jewish community whose consciences refuses to allow Israel's
 colonialism, racism and occupation—the inherent character of Zionism—to
 speak in their name.”

19 Kleiman Decl. ¶ 3.¹ However, it is difficult to soften the characterization of welcoming to campus
 20 students who believe in Israel's right to exist as a "declaration of war."

21 **1. The Court Should Not Take Judicial Notice of Adjudicative Facts within
 22 the Facebook Post**

23 As far as any request to take judicial notice of adjudicative facts, regardless of the parties'
 24 distinct purposes in quoting the Facebook post, the post does not contain facts which are "not subject

25

26 ¹ Notably, the. Kleiman Declaration omits a portion of the first quoted sentence that is included in
 27 the SAC, in which Dr. Abdulhadi states that she perceives Wong's statement to be a declaration of
 28 war "against Arabs, Muslims, Palestinians..." Kleiman Decl. ¶ 3; RJD Ex. A at 1 (quoted in SAC ¶ 130).

1 to reasonable dispute.” Therefore under Rule 201, the RJN must be denied as to any purported
 2 adjudicative facts in Exhibit A.

3 **2. The Court Should Not Incorporate the Facebook Post by Reference**

4 Although not entirely clear, it appears that Dr. Abdulhadi wants the entire Facebook post
 5 incorporated by reference into the SAC. That is, she complains that “Plaintiffs selectively quote
 6 from the post” and “Its authenticity is not questioned in the case at bar.” RJN at 3:23-25. And she
 7 cites the rule that “[a] court may consider a writing referenced in a complaint but not explicitly
 8 incorporated therein if the complaint necessarily relies on the document and its authenticity is
 9 unquestioned.” RJN at 3:7-14 (quoting *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1988),
 10 superseded by statute on other grounds in *Abrego v. Dow Chem Co.*, 443 F.3d 676 (9th Cir. 2006)).

11 Her stated reasoning as to her basis for incorporating Exhibit A by reference is that the
 12 Facebook post refers to the Arab and Muslim Ethnicities and Diasporas Studies department
 13 (“AMED”), and that “AMED is mentioned extensively” in the SAC. RJN at 3:18-4:26 (“The
 14 document is a post on Dr. Abdulhadi’s personal Facebook page that was subsequently shared on
 15 what Plaintiffs claim is the official AMED (Arab and Muslim Ethnicities and Diasporas Studies)
 16 page. . . . AMED is mentioned extensively through the SAC.”) (emphasis added). However, this is
 17 not the standard. The question is not whether the SAC refers to *AMED* extensively. Rather, the
 18 question is whether “the plaintiff refers extensively to the *document*” at issue in the RJN or whether
 19 “the document forms the basis of the plaintiff’s claim.” *Ritchie*, 342 F.3d at 908 (emphasis added).
 20 The SAC only refers to Exhibit A in Paragraph 130. This is not extensive, and Dr. Abdulhadi does
 21 not even attempt to argue that Exhibit A “forms the basis” of the SAC (which it clearly does not).
 22 Thus, the Facebook post does not meet the standard for incorporation by reference and Dr.
 23 Abdulhadi’s request should be denied.

24 **B. The Abdulhadi Column (Exhibit B to the RJN)**

25 Exhibit B to the RJN is a column written by Dr. Abdulhadi on the mondoweiss.net website,
 26 dated July 21, 2017 (the “Abdulhadi column”). Its title is “The Spirit of ’68 Lives On: Zionism as
 27 racism, and the network of lies.” RJN Ex. B at 1. According to the RJN, Dr. Abdulhadi’s purpose in
 28 submitting this column here is to make the Court aware of the following purported facts: “that

1 another Jewish organization, Jewish Voice for Peace (hereinafter ‘JVP’) was welcomed in the KYR
 2 fair,” that “JVP’s table was intentionally tabling between GUPS and AMED Studies,” that “JVP set
 3 up a table, handed out literature and signed up 14 students who expressed interest in forming a local
 4 SFSU JVP chapter, including members of Hillel,” and that “the KYR Fair did not exclude Jewish
 5 students or community members.” Kleiman Decl. ¶ 5.a.

6 **1. The Court Should Not Take Judicial Notice of Adjudicative Facts within
 7 the Abdulhadi Column**

8 The Abdulhadi column is a long mischaracterization of this lawsuit and the Plaintiffs. RJD
 9 Ex. B. Plaintiffs do not question Dr. Abdulhadi’s right to write such blog posts, as vitriolic and
 10 inaccurate as they may be. But the Court cannot grant any request seeking judicial notice of
 11 adjudicative facts within Exhibit B without determining that purported facts in the Abdulhadi
 12 column were “accurately and readily determined from sources whose accuracy cannot reasonably be
 13 questioned.” Fed. R. Evid. 201(b). The purported facts from the Abdulhadi column are certainly in
 14 dispute. For example, the Abdulhadi column states that “organizers did not invite Hillel to table.”
 15 RJD Ex. B at 6. The SAC alleges that Hillel was in fact originally invited and given a viewpoint-
 16 based test, before its invitation was rescinded and it was intentionally excluded. *See* ¶ 117. And the
 17 Abdulhadi column alleges that there was no “basis” for Hillel to participate in the KYR Fair—the
 18 SAC alleges Hillel (compared to other non-registered groups) was certainly entitled to participate.
 19 RJD Ex. B at 6; *see* SAC ¶ 116. Plaintiffs also submit that the Court should not instruct the jury to
 20 accept as conclusive (per Rule 201(f)) that Hillel is “a privileged white group whose members feel
 21 entitled to be represented everywhere and anywhere they deem the event to be of interest
 22 irrespective of the events goals.” RJD Ex. B at 7. The RJD must be denied as to any purported facts
 23 offered by Dr. Abdulhadi in Exhibit B.

24 **2. The Court Should Not Incorporate the Abdulhadi Column by Reference**

25 The Court also should deny the request to incorporate by reference the Abdulhadi column
 26 (RJD Ex. B). Dr. Abdulhadi argues that “Plaintiffs mention [the Abdulhadi column] in Paragraph
 27 160 of their First Amended Complaint and Paragraph 119 of their Second Amended Complaint.”
 28 RJD at 2:10-12. As noted above, Dr. Abdulhadi’s argument that her column is referenced in

1 Plaintiffs' FAC is of no moment as the FAC has been superseded and is a legal nullity. *See Ferdik v.*
 2 *Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). As for Dr. Abdulhadi's claim that Plaintiffs mention
 3 the Abdulhadi column in Paragraph 119 of the SAC, this is false.² Here is the full text of Paragraph
 4 119 of the SAC:

5 **119. Defendants Begley and Montiero** consciously and
 6 intentionally knew of and permitted Hillel's exclusion. Saliem
 7 Shehadah, one of the self-described organizers of the Fair,
 8 admitted publicly that Hillel was intentionally excluded. As a
 9 GUPS member and a COES Graduate Student, Mr. Shehadeh
 worked very closely with **Dr. Abdulhadi**, who was not only
 GUPS's faculty advisor but was also the personal and academic
 focus of Mr. Shehadeh's graduate studies.³

10 There is no reference to any document written by Dr. Abdulhadi in this paragraph or its footnote.
 11 Dr. Abdulhadi refers to the Court's March 9, 2018 Order as part of her argument to incorporate this
 12 document by reference. RJD at 5:10-16. But the Court's Order did not grant Dr. Abdulhadi's
 13 request to incorporate her column by reference, noting that "the full blog post was not attached to
 14 either of the motions to dismiss or as part of Abdulhadi's request for judicial notice." ECF No. 124
 15 at 25:4-13 (citing *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005)). The operative complaint
 16 makes no reference to the Abdulhadi column, nor does the Abdulhadi column form the basis of the
 17 SAC. Based on *Ritchie*, 342 F.3d at 908, the request to incorporate Exhibit B by reference must be
 18 denied.

19
 20
 21
 22 ² Contrary to the RJD (at 1:7-21) the SAC only cites to Exhibit A (at ¶ 130), and does not cite to any
 23 of the other RJD Exhibit documents. Any citations by Plaintiffs in the First Amended Complaint are
 24 irrelevant as that complaint has been superseded and is a legal nullity. *See Ferdik v. Bonzelet*, 963
 25 F.2d 1258, 1262 (9th Cir. 1992) (citing *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542,
 1546 (9th Cir. 1990) ("an amended pleading supersedes the original")); 6 Charles A. Wright, Arthur
 26 R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1476, at 556-59 (1990) ("A pleading
 27 that has been amended under Rule 15(a) supersedes the pleading it modifies. Once an amended
 28 pleading is interposed, the original pleading no longer performs any function in the case").

³ Paragraph 119 includes a footnote that states: "Notwithstanding their extensive personal and academic relationship, Defendant Abdulhadi was on the committee that approved Mr. Shehadeh's hagiographic thesis, submitted in partial fulfillment for his Master of Arts in Anthropology in May 2017."

3. The Ostensible Participation of “Jewish Voice for Peace” in the “Know Your Rights” Fair is Irrelevant to Whether Plaintiffs Have Stated a Claim

While the SAC does not refer or rely on the Abdulhadi column, the RJN seeks to recall the FAC’s reference to this column in order to bring purported facts about “Jewish Voice for Peace” (“JVP”) into the record. *See* RJN at 2:10-11 (citing FAC ¶ 160). The RJN also attaches two other documents (Exhibits C and D, discussed further below) to accomplish this same purpose. However, the larger point—made in more detail in Plaintiffs’ concurrently-filed opposition to Dr. Abdulhadi’s motion to dismiss—is that the ostensible participation of JVP in the “Know Your Rights” Fair has no bearing on the question of whether Plaintiffs have stated a claim, for several reasons. *First*, to consider Plaintiffs’ points regarding JVP would essentially be granting summary judgment, based on factual allegations that cannot be adequately investigated here. An individual named David Spero, who is not a student and has no affiliation to SFSU, purported to be at the KYR Fair, apparently handing out literature. Plaintiffs do not know that to be accurate, nor do they know who else he was with (if anyone), what his actual purpose was, what the circumstances or process was that led him to be there, whether he was called in that morning, etc. These are disputed facts that cannot be resolved at this stage without discovery, which is currently stayed pursuant to the Court’s order.

Second, with regard to the Fifth and Sixth Causes of Action focused on the “Know your Rights” Fair, Plaintiffs allege in the SAC that they were treated differently than other similarly situated students when their registered student group was intentionally barred from hosting a table at the event. If their group had hosted a table, they would have had a place at the Fair to exchange ideas and information focused on the rights of Jews (regardless of what viewpoints they had). JVP is not a registered student group, and David Spero is not a student. JVP and its supporters are not similarly situated to Hillel and the KYRF Plaintiffs. For this simple reason, what did or did not happen with JVP is irrelevant.

Third, even assuming one off-campus non-registered group which strategically includes “Jewish” in its name was allowed to participate in the KYR Fair, that does not necessarily mean that Plaintiffs, as Jews, did not face religious discrimination. In addition, whether one gentleman at a table constitutes a “Jewish group” participating in the fair, and whether that gentleman was equipped

1 to provide the kind of informational training related to the protection of civil rights that was offered
 2 to other students whose representative *on-campus organizations* participated in the Fair, and whether
 3 JVP is a Jewish group at all, are factual questions that cannot be decided on a motion to dismiss, nor
 4 can the circumstances of this alleged participated in the “at capacity” KYRF be resolved on a motion
 5 to dismiss. With regard to the KYR Fair constitutional claims against Dr. Abdulhadi (COAs 5-6),
 6 Plaintiffs have alleged facts in the SAC that suffice to state a claim against her regardless of any
 7 purported JVP involvement. *See SAC ¶¶ 34, 113, 116-120, 130* (alleging Hillel is the only SFSU
 8 student group welcoming all Jews as Jews; that Hillel was entitled to host a table at the Fair, that
 9 Hillel sought to participate and was denied a table under false pretenses after being the only group
 10 subject to a viewpoint-based test; that Dr. Abdulhadi advised and closely mentored members of the
 11 planning committee, including Mr. Shehadeh; that Dr. Abdulhadi’s advisees intentionally brought
 12 about Hillel’s exclusion with the knowledge, before the event, of the other KYRF Defendants; and
 13 that the intentional exclusion was executed on the specific direction of Dr. Abdulhadi, who later
 14 ratified the exclusion).

15 *Fourth*, Dr. Abdulhadi’s argument that JVP’s participation negates a religious discrimination
 16 claim is undermined by the RJN itself. According to Dr. Abdulhadi, and quoting an article by her
 17 protégé and mentee, Saliem Shehadeh, which is one of the subjects of the RJN, “JVP set up a table,
 18 handed out literature and signed up 14 students who expressed interest in forming a local SFSU JVP
 19 chapter, *including members of SF Hillel.*” RJN Ex. C (emphasis added). Dr. Abdulhadi thereby
 20 expressly admits that SF Hillel is a group whose Jewish student members hold a diverse array of
 21 positions on Israel and Zionism—including anti-Zionist and anti-Israel positions, such that multiple
 22 SF Hillel members would “express interest in forming a local SFSU JVP chapter.” The corollary is
 23 that, in contrast to the “big [Jewish] tent” of SF Hillel, *JVP* is not a Jewish group that welcomes
 24 Jewish students of all stripes, but a political group that exclusively welcomes students holding the
 25 same positions on Israel and Zionism—namely, in opposition to both. Dr. Abdulhadi ignores that
 26 based on her own (mis-)characterization of Hillel as a political group, and not a Jewish or religious
 27 one, *JVP would necessarily also be a political group, and not a Jewish or religious group.* Even if
 28 the Court were to consider purported facts about JVP’s involvement, the extent of the consideration

1 would be that an off-campus, unrecognized, non-student, political organization strategically called
 2 “Jewish Voice for Peace” participated in the “Know Your Rights” Fair as a cover for the intentional
 3 exclusion of and discrimination against Hillel—the only campus student group representing all Jews,
 4 regardless of other considerations.

5 **C. The Shehadeh Column (Exhibit C to the RJN)**

6 Exhibit C is a column written by non-party Saliem Shehadeh regarding the “Know Your
 7 Rights” Fair (the “Shehadeh column”). While Dr. Abdulhadi asks the Court to take judicial notice
 8 of the Shehadeh column in order to introduce JVP’s involvement into the record (RJN at 7:10-24;
 9 Kleiman Decl. at ¶¶ 6-7), for the reasons explained above, JVP’s involvement is irrelevant to
 10 whether Plaintiffs have stated their “Know Your Rights” Fair claims against Dr. Abdulhadi. Further,
 11 Dr. Abdulhadi cannot meet either the Rule 201 standard or the incorporation by reference standard
 12 as to this document.

13 **1. The Court Should Not Take Judicial Notice of Adjudicative Facts within
 14 the Shehadeh Column**

15 Like the Abdulhadi column, non-party Saliem Shehadeh’s column, also printed on
 16 mondoweiss.net, is not a reliable source for adjudicative facts which are beyond dispute. Fed. R.
 17 Evid. 201(b). For example, the Shehadeh column also states, among other purported “facts,” that
 18 Hillel was an “ill fit” for the Fair. RJN Ex. C at 5. But the SAC specifically disputes this, as noted
 19 above, alleging that Hillel was entitled to host a table at the KYR Fair and belonged there (SAC ¶¶
 20 114-116). The Shehadeh column amounts to a series of attacks and mischaracterizations of Mr.
 21 Shehadeh’s targets, including Hillel and this lawsuit—it is not a source of undisputable (or
 22 undisputed) facts and Mr. Shehadeh is not a source “whose accuracy cannot reasonably be
 23 questioned” such that his column could be judicially noticed for its content pursuant to the Federal
 24 Rules of Evidence. Fed. R. Evid. 201(b). Therefore the RJN should be denied as to any purported
 25 facts in Exhibit C.

26 **2. The Court Should Not Incorporate the Shehadeh Column by Reference**

27 According to the RJN, Plaintiffs “mention this document in Paragraph 119.” *Id.* at 2:13-15.
 28 This is false. As the RJN points out, Plaintiffs do allege that Mr. Shehadeh “admitted publicly that

1 Hillel was intentionally excluded” from the “Know Your Rights” Fair. *Id.* at 6:20-21 (citing SAC
 2 ¶ 119). But the SAC does not reference the Shehadeh column itself. Regardless, the RJD seeks to
 3 have the “full document” of the Shehadeh column before the Court so that the purported “full story”
 4 will be apparent. *Id.* at 6:22-23. This arguable reference to the Shehadeh column in the SAC is
 5 vague at best, and does not constitute the SAC “extensively” relying on the Shehadeh column. Nor
 6 is there any viable argument that the Shehadeh column forms the basis of the SAC. Therefore, based
 7 on *Ritchie*, 342 F.3d at 908, the request to incorporate Exhibit C by reference also must be denied.

8 **D. The Spero Letter (Exhibit D to the RJD)**

9 Exhibit D is a letter by David Spero to JWeekly regarding his opinions of Hillel and this
 10 lawsuit (the “Spero letter”). Mr. Spero is neither a student nor is he employed at SFSU, and neither
 11 Mr. Spero nor his letter are referenced anywhere in the SAC in any way. Nevertheless, Dr.
 12 Abdulhadi asks the Court to consider the Spero letter’s purported facts at the pleading stage,
 13 apparently because “Plaintiffs repeatedly refer to JWeekly throughout the SAC” and the Spero letter
 14 was also printed in JWeekly. *Id.* at 7:17-24. While Dr. Abdulhadi asks the Court to take judicial
 15 notice of the Spero letter in another attempt to introduce JVP’s involvement into the record (RJD at
 16 7:10-24; Kleiman Decl. at ¶¶ 8-9), for the reasons explained above, JVP’s involvement is irrelevant
 17 to whether Plaintiffs have stated a claim. Further, as with the other RJD exhibits, Dr. Abdulhadi
 18 cannot meet either the Rule 201 standard or the incorporation by reference standard as to Exhibit D.

19 **1. The Court Should Not Take Judicial Notice of Adjudicative Facts within
 20 the Spero Letter**

21 Exhibit D is a letter written by David Spero published in the “Opinion” section of The Jewish
 22 News of California on June 23, 2017. RJD Ex. D at 1. Mr. Spero is not a party to this litigation and
 23 has no affiliation with SFSU. According to Mr. Spero, he personally attended the “Know Your
 24 Rights” Fair and hosted a table there—something Hillel was intentionally denied the opportunity to
 25 do, based on the conduct of Dr. Abdulhadi and the other KYRF Defendants. Mr. Spero states that
 26 the conflict over the Fair incident “stems from the institutional Jewish community’s desire to stop
 27 criticism of Israel, not to protect Jewish students.” *Id.* at 2.

1 While the basis for this opinion is not at all clear, Mr. Spero is entitled to it. Yet the SAC
2 specifically alleges the opposite (*see* SAC ¶¶ 175-199). Mr. Spero has certainly made clear that he
3 and his letter to the Opinion section are not sources “whose accuracy cannot reasonably be
4 questioned,” and that any purported facts in his letter are “subject to reasonable dispute”—and in
5 fact, are expressly disputed. Therefore the RJN must be denied as to any purported facts in
6 Exhibit D.

2. The Court Should Not Incorporate the Spero Letter by Reference

8 The request to incorporate the Spero letter by reference should also be denied. Dr.
9 Abdulhadi does not point to one paragraph in the SAC that refers to the Spero letter (because there
10 are none). Instead, Dr. Abdulhadi notes that the Spero letter refers to the “Independent Review
11 Report,” and the Court took judicial notice of the same report (“for the limited purpose of the fact of
12 SFSU’s investigation and conclusions and not as to the truth of any disputed facts”), ECF No. 124 at
13 5:21-28. Because the Spero letter refers to a report judicially noticed by the Court, Abdulhadi
14 argues, the Spero letter should also be judicially noticed. But there is no authority that the transitive
15 property applies to the doctrine of incorporation by reference. Applying the actual test under
16 *Ritchie*, 342 F.3d at 908, the SAC does not rely on the Spero letter at all, and the letter does not form
17 the basis of the SAC. Therefore, the request to incorporate Exhibit D by reference should be denied.

E. The Appeal Response (Exhibit E to the RJN)

Finally, Exhibit E is ostensibly a redacted version of California State University’s (“CSU”) Executive Order 1096/1097 (Revised) Appeal Response regarding CSU’s nonpublic findings of its internal (and not independent) investigation into the exclusion of Hillel from the KYR Fair (the “Appeal Response”). The RJN argues that Exhibit E “represents an authoritative version of California State University’s conclusions about the investigation of the Know Your Rights Fair,” and therefore the Court should either incorporate the Appeal Response by reference or potentially take judicial notice of its purported factual findings (notwithstanding that those findings were reached by Dr. Abdulhadi’s co-Defendant, the findings have no legal authority, and no one has provided Plaintiffs or the Court with the underlying report, appeal, or an unredacted version of the Appeal Response).

1 **1. The Court Should Not Take Judicial Notice of Adjudicative Facts within**
 2 **the Appeal Response**

3 The investigation that led to the underlying response was not conducted by any independent
 4 or outside investigators, but rather by Dr. Abdulhadi's co-Defendant Board of Trustees of the
 5 California State University. The facts and findings of the Appeal Response are directly disputed by
 6 the SAC (as well as many others with knowledge in the SFSU community). Granting judicial notice
 7 of the "facts" within the Appeal Response would require that the jury be *instructed* that Hillel's
 8 exclusion was viewpoint discrimination and not religious discrimination. RJD Ex. E at 4-5. The
 9 SAC specifically disputes this, alleging the exclusion was in fact religious discrimination. *See* SAC
 10 ¶ 189 ("the KYR Defendants, who intentionally excluded from the fair based on the Jewish identity
 11 of Hillel's members..."). The RJD therefore must be denied as to purported facts or findings in the
 12 Appeal Response as well.

13 **2. The Court Should Not Incorporate the Appeal Response by Reference**

14 Finally, Dr. Abdulhadi seeks to incorporate by reference the Appeal Response (Exhibit E to
 15 the RJD) regarding the KYR Fair. Dr. Abdulhadi has made no showing that this document forms the
 16 basis of the SAC or that the SAC extensively refers to the Appeal Response. In fact, the SAC does
 17 not refer to the Appeal Response at all, most likely because it is dated April 13, 2018, *two weeks*
 18 *after* Plaintiffs filed the SAC. Plaintiffs had not seen or reviewed the Appeal Response at all before
 19 Dr. Abdulhadi filed the RJD. And while the results of SFSU's commissioned, internal non-
 20 independent investigation impacted the KYRF Plaintiffs, the unredacted version of Exhibit E has
 21 never been made public or produced to Plaintiffs. *See* SAC ¶ 124. For all of these reasons, the
 22 request to incorporate the Appeal Response by reference also should be denied.

1
2 **IV. CONCLUSION**

3 For the foregoing reasons, Dr. Abdulhadi's request for judicial notice should be denied.
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5 Dated: June 6, 2018

WINSTON & STRAWN LLP

6 By: /s/ Seth Weisburst

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